

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING**

74-1423

~~74-8053~~

BPLS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-8053

UNITED STATES OF AMERICA ex rel.
JOSEPH M. PAQUETTE,

Petitioner-Appellant,

against

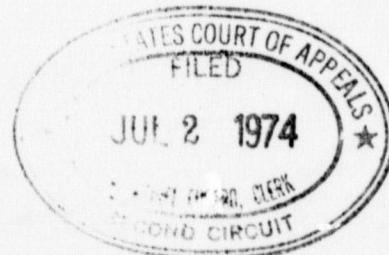
J. E. LAVALLÉE, superintendent
Clinton Correctional Facility,
Dannemora, New York,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

NORMAN R. NELSON, ESQ.
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorney for Petitioner-Appellant



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- -x
UNITED STATES OF AMERICA ex rel. :
JOSEPH M. PAQUETTE, :
Petitioner-Appellant, : Docket No. 74-8053
-against- :
J. E. LAVALLÉE, superintendent :
Clinton Correctional Facility, :
Dannemora, New York, :
Respondent-Appellee.
----- -x

PETITION FOR REHEARING PURSUANT
TO RULE 40 OF THE FEDERAL RULES
OF APPELLATE PROCEDURE

The facts giving rise to petitioner's claim of double jeopardy are detailed in petitioner's main brief and need not be repeated here. Petitioner seeks rehearing because the Court overlooked points of law and fact which reveal that its decision was in error.

At the close of the oral argument, the Court announced from the bench its decision to affirm. Judge Mansfield, speaking for the Court, briefly explained that the affirmance was on the basis that the necessary witnesses were unavailable as the result of circumstances beyond the prosecutor's control and likened the case to Wade v. Hunter, 336 U.S. 684 (1949),

where the movement of an army in the field made necessary witnesses unavailable. This conclusion overlooks the fact that the first trial in this action commenced without necessary witnesses because of prosecutorial neglect in ascertaining whether such witnesses would be available before the jury was sworn. It also overlooks the fact that in Wade one of the important circumstances justifying the application of the doctrine of manifest necessity was that the court martial officers were needed to perform their military function. 336 U.S. at 692. This factor makes the Wade decision much more like Simmons v. United States, 142 U.S. 148 (1891), or Thompson v. United States, 155 U.S. 271 (1894), where possible disqualification of trial jurors was discovered during trial. It sharply distinguishes Wade from Downum v. United States, 372 U.S. 734 (1963), which found double jeopardy applicable where witnesses were unavailable.

Petitioner respectfully submits that when all the circumstances are examined, there is no basis in the doctrine of manifest necessity for the decision to discharge the jury and compel petitioner to face a second trial.

Dated: New York, N.Y.
July 2, 1974

Respectfully submitted,

NORMAN R. NELSON
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorney for Petitioner